STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 7, 2011
v	No. 295258 Oakland Circuit Court
JAMES CRAIG SMITH, Defendant-Appellant.	LC No. 2009-226550-FC

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration), and domestic violence, MCL 750.81(2).[1] Defendant was sentenced to 15 months to 15 years in prison for the CSC III conviction, and to time served for the domestic violence conviction. We affirm.

I

On appeal, defendant first argues that the admission of a police investigator's allegedly inflammatory testimony denied him a fair trial. We disagree. We review for an abuse of discretion the trial court's decision to admit or exclude evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). If the trial court's decision falls within the range of principled outcomes, no abuse of discretion has occurred, and the reviewing court may properly defer to the trial court's judgment. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant first challenges the police investigator's testimony regarding the content and nature of an audio recording of a particularly brutal session of "mandated" sex between defendant and the complainant:

Q. You didn't listen to the whole [recording] at that time?

[1] The jury acquitted defendant of various other charges.

A. No, Ma'am.

Q. Why not?

A. The portions I listened to were—well, I've been around a lot of terrible things—it was the worst thing I've ever heard. I mean I, I don't know another way to describe it. And it was clear that an assault was occurring, uh—

Defense counsel objected to the police investigator's last statement as a conclusion on an ultimate issue to be determined by the jury. The trial court overruled the objection, with the following caveat:

> Ladies and gentlemen of the jury, I'm going to overrule the objection with this caveat. That obviously you have been impaneled as the jury to determine whether or not the people will sustain their burden to prove beyond a reasonable doubt each and every element of the offense.
>
> This testimony is not being offered as an expert opinion, nor is it being offered even as a lay opinion. It is being offered to explain how the officer proceeded to conduct his investigation and should be given whatever weight and credibility you deem it should be given in connection with that answer and the purpose for which it is offered.

Defendant now contends that the trial court abused its discretion by overruling the objection. In essence, defendant asserts that the police investigator's opinion on an ultimate issue was equivalent to vouching for the credibility of the complainant—i.e., that by offering such an opinion, the investigator effectively vouched for the complainant's testimony that a sexual assault had actually occurred.

Witnesses may not comment on or offer an opinion regarding the credibility of another witness, since the determination of witness credibility is a matter reserved for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Further, although "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," MRE 704, here the trial court specifically stated that the investigator was *not* offering opinion testimony.

However, even assuming arguendo that this portion of the police investigator's testimony was improperly admitted, we believe that the trial court's cautionary instruction cured any resulting prejudice. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Instructions are presumed to cure most errors, and jurors are presumed to follow their instructions. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009).

Defendant next challenges the police investigator's testimony regarding the nature, character, and depth of his background in investigations and police work. We find this argument without merit. Because defendant failed to preserve this issue, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court may properly reverse only when the error resulted in the conviction of an actually

innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Id*.

The police investigator's testimony regarding his background in similar matters and years of experience did not improperly bolster his credibility, but merely laid a foundation to support his testimony. Further, defendant cites no authority to support the proposition that an officer testifying may not provide information regarding the extent of his experience in the field. We find no outcome-determinative plain error in this regard.

The last portion of the police investigator's testimony that defendant challenges is as follows:

> *A.* [A]t that point, I then notified my investigative supervisor that I needed him to respond to the station.
>
> *Q.* Why?
>
> *A.* The situation was, uh, required another investigator because I knew that I was going to have to look into the situation further and to, uh, have another investigator come in, I need to get supervisory authority. And looking at what I had and listening to what I had, I wanted my supervisor to hear the tape also.
>
> *Q.* Why?
>
> *A.* The situation was . . . beyond the realm of normal to me in my professional experience, uh—

Defense counsel failed to object to this testimony, and our review is therefore limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. Here, once again, the police investigator merely offered his opinion regarding the seriousness of the situation before him. Importantly, the jury listened to the audio recording in its entirety and was perfectly free to make its own determinations regarding its severity, wholly independent of the police investigator's opinion. Further, at least two other witnesses testified that they found the tape disturbing. Defense counsel failed to object to the testimony of these other witnesses, and defendant does not challenge their testimony on appeal. In other words, the jury heard testimony regarding the disturbing quality of the audio recording that was entirely independent of the police investigator's opinion on this matter.

In his reply brief, defendant attempts to refute the prosecution's argument that the admission of the challenged testimony did not prejudice him. But as noted previously, the jury heard other unchallenged testimony regarding the disturbing content of the audio recording, the recording was played in open court, and the trial court's cautionary instruction worked to alleviate any potential prejudice. Defendant also maintains that it is naïve for the law to presume that jurors follow their instructions. As the United States Supreme Court has acknowledged, however, "[t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson v Marsh*, 481 US 200, 211; 107 S Ct 1702; 95 L Ed 2d

176 (1987). Quite simply, defendant has failed to establish any outcome-determinative plain error in the admission of the police investigator's testimony. *Carines*, 460 Mich at 763. And even if all of defendant's challenges in this regard had been properly preserved, we would still be unable to say that any evidentiary error more probably than not affected the outcome of defendant's trial. MCL 769.26; *People v Lukity*, 460 Mich 484, 496-497; 596 NW2d 607 (1999).

II

Defendant next argues that the trial court's failure to disclose to defense counsel an ex parte communication between the complainant's therapist and the trial court, revealing that the complainant had made a threat on defendant's life, resulted in prejudice entitling him to resentencing before a different judge. We disagree. An alleged due process violation raises a question of constitutional law that we review de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). Whether a defendant received effective assistance from his trial counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The trial court addressed the concerns regarding the ex parte communication when it denied defendant's motion for bond pending appeal in an order of November 24, 2009:

> In addition, this Court has been provided a letter from [defense] counsel, Mr. Steingold, addressed to the prosecuting attorney, inter alia, "demanding when the Court was informed of these t[hreat]s and [the complainant]'s apparent emotional problems. You are aware, of course, that [the complainant]'s emotional 'injury' was a contested issue at sentencing. I have received [sic] information that the Court had extra security in the courtroom at the time of the sentencing because he was aware of the threats. That suggests an ex parte comunication [sic] between you and the Court." For the edification of [d]efendant and his counsel, the Court did not receive [sic] any information from the prosecutor about threats from the victim, and the Court did not take those allegations into consideration at the time of sentencing.

Subsequently, defendant filed a motion for reconsideration of the trial court's order. In denying defendant's motion, the trial court provided a cogent, detailed, and thorough analysis, ultimately concluding that no prejudice had resulted. Further, the case that defendant cites to support his argument, *People v Vroman*, 148 Mich App 291, 296; 384 NW2d 35 (1985), overruled in part on other grounds *People v Wright*, 431 Mich 282 (1988), is distinguishable from the case at bar. In *Vroman*, the trial court found resentencing appropriate because the ex parte communications (1) accused the defendant of wrongdoing, and (2) were made by "persons in an adversarial role in the proceedings." Here, however, neither of these elements exists. The communication accused *the complainant* of wrongdoing, and the complainant's therapist, who plays no adversarial role in the proceedings, initiated the communication. Unlike the defendant in *Vroman*, defendant in this case simply had no need to defend himself with respect to the communication because it contained no adversarial accusation against him.

Defendant also asserts that he could have used the psychiatric records pertaining to the complainant's mental state to cast doubt on the reliability or accuracy of her accounts of

defendant's behavior. It is not the role of the sentencing judge, however, to make such determinations. The jury performed this function in the process of reaching a verdict, before the ex parte communication had ever occurred. Accordingly, we find this argument without merit.

In his reply brief, defendant criticizes the prosecution for relying on a hindsight analysis of what might or might not have happened had the trial judge made the appropriate disclosures. We are not convinced. Moreover, regardless of what the prosecution argued, the trial court did not rely on a hindsight analysis. Rather, the trial court stated that it "did not consider the communication whatsoever at the time of sentencing," and even if it had, "[the threat] would in no manner" have effected defendant's sentencing. We perceive no error requiring resentencing.

Because the ex parte communication did not deny defendant his right to due process, his related argument—i.e., that the trial court's failure to disclose the communication to defense counsel impinged upon his right to the effective assistance of counsel—is similarly without merit. In addition, because resentencing is unwarranted, defendant's request to assign the case to a different judge need not be addressed. Finally, an evidentiary hearing is unwarranted because the record amply supports the trial court's conclusion that the ex parte communication did not result in prejudice, making further factual development unnecessary.

III

Defendant lastly argues that he is entitled to resentencing because the prosecution did not present sufficient evidence of psychological injury to support the assessment of 10 points for offense variable (OV) 4. We disagree.

We review factual findings at sentencing for clear error, and the trial court's decision to score an offense variable for an abuse of discretion. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). The ultimate question for this Court is whether the trial court properly exercised its discretion and whether the evidence on the record adequately supports the particular score. *Id*.

A sentencing court may assess 10 points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The relevant statute directs the sentencing court to assess 10 points even if "the serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2) (emphasis added).

This Court has sustained the assessment of 10 points for OV 4 on less evidence than was presented in this case. For example, in *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004), this Court found no error with respect to the scoring of OV 4 when the prosecution presented evidence that the defendant's behavior disrupted the victim's life and gave her nightmares, even though she had not yet sought professional treatment. This Court has similarly found a victim's testimony that the defendant's behavior caused her fear to be sufficient to support the assessment of 10 points for OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

In this case, the complainant testified repeatedly that defendant's conduct made her fearful. She also testified that she is on medical leave from work because she suffers from post-

traumatic stress. In addition, she takes medication for her anxiety, suffers from depression and insomnia, and has difficulty concentrating. Contrary to defendant's assertion, the trial court's assessment of 10 points for OV 4 was not improper merely because the complainant never sought psychological treatment during her marriage. *People v Davenport*, 286 Mich App 191, 200; 779 NW2d 257 (2009). The trial court did not clearly err by determining that the complainant suffered psychological injury, and did not abuse its discretion by assessing ten points for OV 4.

In his reply brief, defendant argues that the record does not support the prosecutor's assertion that the complainant "was seeing a psychologist as a result of the abuse," and that the trial court therefore improperly relied on this assertion when it scored OV 4. We disagree. What the prosecutor may or may not have stated in this regard is largely irrelevant given the complainant's clear testimony that she had suffered fear, anxiety, and post-traumatic stress. A fact used at sentencing need only be proved only by a preponderance of the evidence. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991); see also *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). Regardless of how adequately the sentencing judge articulated his findings, the record evidence amply supported the particular score and no abuse of discretion occurred.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood